UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANWAR ALKHATIB,
Plaintiff,

-against- **Case No. 13-CV-2337 (ARR) (SMG)**

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

SHAHADAT TUHIN
Plaintiff,

-against- **Case No. 13-CV-5643 (ARR) (SMG)**

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

SIMON GABRYS,
Plaintiff,

-against- **Case No. 13-CV-7290 (ARR) (SMG)**

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

BORIS FREIRE, et al,
Plaintiffs,

-against- **Case No. 13-CV-7291 (ARR) (SMG)**

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

ZHENG HUI DONG,
Plaintiff,

-against-

Case No. 14-CV-2980 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

NASRIN CHOWDHURY,
Plaintiff,

-against-

Case No. 14-CV-2981 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants,

TAREQUE AHMED
Plaintiff,

-against-

Case No. 15-CV-0284 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

YSABEL BANON,
Plaintiff,

-against-

Case No. 15-CV-4691 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

CHEA SUNG PARK,
Plaintiff,

-against-

Case No. 15-CV-5374 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION IN LIMINE FOR SPOLIATION SANCTIONS

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PRELIMINARY STATEMENT

Plaintiffs jointly submit this Memorandum of Law in Further Support of their Motion in Limine for Spoliation Sanctions against Defendants Mamdoh Eltouby, Nada Smith, New York Motor Group LLC ("NYMG") and Planet Motor Cars, Inc. ("PMC") (collectively, "Defendants") based on Defendants' deliberate abandonment of a hard drive critical to these related cases. In their Opposition, Defendants admit that they deliberately abandoned this evidence, but argue that the hard drive was not critical because, when it was abandoned, it no longer contained recordings of the initial meetings at which Plaintiffs were fraudulently induced into signing financing agreements.

The facts presented by Defendants are both hearsay and contradictory, and entirely miss the point about why this evidence is critical.

The evidence that would have been found on this hard drive is critical for three reasons: (1) certain Plaintiffs' initial and follow-up interactions with NYMG employees indisputably were captured on the hard drive after the duty to preserve was triggered; (2) potentially other transactions and follow-up interactions with Plaintiffs also could have been captured, which a physical inspection would have been necessary to verify; and (3) recordings of NYMG's interactions with any consumer would have provided information about key issues in dispute, such as Mr. Eltouby's and Mrs. Smith's knowledge of Julio Estrada's fraudulent practices, Mrs. Smith's role in the operation, and Mrs. Smith's credibility.

The Court should disregard Defendants' last-minute, inadequate attempt to minimize the evidentiary value of the abandoned hard drive, and impose the requested sanctions.

ARGUMENT

I. The Purported Evidence Submitted by Defendants is Contradictory and Hearsay

Defendants' opposition consists of a declaration from counsel Richard Simon ("Simon Decl."), an affidavit from Mr. Eltouby ("Eltouby Aff."), and an affidavit from Faisal Khan. Mr. Khan is the owner of Auto Solution, the dealership that occupied NYMG's premises after it closed. Although Mr. Eltouby affirms that "[n]either I nor [NYMG] had engaged in any previous dealings with Auto Solution or its owners," (Eltouby Aff. ¶7), Mrs. Smith testified to having worked for Mr. Khan *immediately after leaving NYMG*. (Ex. A[1], 21:3-23:3.)

In large part, Defendants' submission repeats (and at times contradicts) Mr. Eltouby's and Mrs. Smith's deposition testimony, which formed the basis for this Motion. In fact, the only new information is Mr. Eltouby's and Mr. Simon's speculation about what Yoel Cohen, allegedly the technician who installed the surveillance system, might say about the matter. Initially, the identity of Mr. Cohen was never disclosed to Plaintiffs, even though they specifically called for production of this information in Mr. Eltouby's deposition and in follow-up written requests. (Ex. C, 441:10-442:4; Ex. M.) For this reason alone, Defendants should not be permitted to rely on Mr. Cohen's hypothetical testimony here.

Moreover, the speculation about what Mr. Cohen might say is simply self-serving hearsay and should not be considered by the Court. Indeed, Defendants cannot even get the contents of this speculative hearsay straight: Counsel affirms that Mr. Cohen would testify that there was no back-up retention system, (Simon Decl. ¶ 6), while Mr. Eltouby affirms that he would testify that the

[1] All cited exhibits are to the Exhibits attached to the February 27, 2017 Declaration of Ariana Eva Lindermayer, filed in Support of this Motion. (*Alkhatib*, Dkt. No. 157).

recordings were preserved for "a limited time," (Eltouby Aff. ¶ 4.)[2] These differing accounts of Mr. Cohen's hypothetical testimony conflict with Julio Estrada's testimony that the recordings were never erased from the hard drive, (Ex. H, 160:15-24), underscoring the prejudice to Plaintiffs from being deprived of their right to inspect the physical hard drive.

II. Defendants' Duty to Preserve Evidence Arose Prior to the Letter from Shahadat Tuhin's Counsel

Defendants' obligation to preserve evidence began, at the latest, on May 2, 2013, when NYMG and PMC were served with the first of these related cases, *Alkhatib v. NYMG*. By August 2013—when the new surveillance system was allegedly installed—Defendants were on notice of countless complaints of rampant fraud at NYMG. A month later, on September 12, 2013, counsel for Plaintiff Shahadat Tuhin made an explicit request for surveillance recordings.

A duty to preserve evidence arises when the party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)). This duty may arise even prior to the filing of a lawsuit, when the party has notice that a lawsuit is reasonably foreseeable. *Simoes v. Target Corp.*, No. 11 CV 2032 DRH WDW, 2013 WL 2948083, at *5 (E.D.N.Y. June 14, 2013); *Siani v. State Univ. of N.Y. at Farmingdale*, No. CV09-407 JFB WDW, 2010 WL 3170664, at *5 (E.D.N.Y. Aug. 10, 2010). Once the duty to preserve arises, a litigant is expected, at the very least, to suspend its routine document destruction policy and put in place a litigation hold. *Id.* Importantly, this obligation to preserve relevant evidence falls on the litigant, apart from any independent obligation on the part of its attorney. *See Chen v. LW Rest., Inc.*, No. 10 CV 200 ARR, 2011 WL 3420433, at *11 (E.D.N.Y. Aug. 3, 2011) ("[D]efendants decide who to retain as

[2] Moreover, Mr. Eltouby cannot even get his own testimony straight, as he has provided conflicting testimony on the critical issues of how long the recordings are preserved, when the previous hard drive was allegedly stolen, and when the new surveillance system was installed. (Eltouby Aff. ¶¶ 4, 5, 6; Ex. C, 114:25-115:7 (testifying that the hard drive was stolen in August 2013)).

their counsel and thus they are also responsible for [their] attorney's negligent conduct or bad advice in connection with the action. . . . Although counsel is required to inform his clients of their obligations, [a]t some point, the client must bear responsibility for a failure to preserve.") (internal citations and quotations omitted).

While Mr. Eltouby affirms that he was never shown any of Plaintiffs' requests because they were addressed to the dealership, one such request was addressed to him personally and summarizes a conversation directly with him requesting the recordings. (Ex. E.) His affidavit does not address that, or provide any information about whether Mrs. Smith reviewed these requests. And in any event, letters and requests for documents were properly sent to Mr. Eltouby's counsel, so his alleged failure to see the documents does not excuse his compliance with his discovery obligations.

Furthermore, Defendants were obligated to preserve evidence months before Plaintiffs' first explicit request for the recordings, as litigation had been initiated in *Alkhatib* and was reasonably foreseeable in countless other cases. Mr. Eltouby disputes this fact, affirming that when he installed the new surveillance system in August 2013, he "didn't anticipate that the dealership would ever need to preserve the information [for] any greater period." (Eltouby Aff. ¶ 6.) This statement is incredible given the fact that by August 2013, there had been two protests at NYMG regarding its fraudulent practices, and that over the next few months, NYMG was receiving so many customer complaints that the police were being called to the dealership every two weeks, (Ex. A, 79:6-9; Ex. C, 480:15-481:7). Accordingly, Defendants' duty to preserve relevant evidence had been triggered at the latest by May 2013 and, certainly, by August 2013.

As to Defendants' argument that Plaintiffs have somehow waived their right to seek these sanctions now, Plaintiffs note that they raised this matter during conferences with the Court, including at the February 28, 2014 telephone conference before Magistrate Judge Pollack that resulted in a Court-ordered litigation hold (formalizing the written demands to preserve evidence already made). After Defendants stated that they had no recordings, Plaintiffs repeatedly asked whether recordings had been made but unpreserved, in violation of the litigation hold. (Ex. M.) Despite these efforts, Plaintiffs did not receive any information about why there were no recordings until Mr. Eltouby's deposition, when he testified that he had abandoned the hard drive on the premises when NYMG closed. With that information, Plaintiff pursued additional discovery measures, serving a third-party subpoena on Auto Solutions and receiving no response.[3] With respect to Defendants, however, there would have been no purpose in pursuing discovery of evidence that they had admitted to deliberately abandoning. At that point, the only available remedy would be a spoliation sanction, which Plaintiffs now seek.

III. Spoliation Sanctions are Warranted Here Because Critical Information was Made Unavailable to Plaintiffs

It is undisputed that when Mr. Tuhin's counsel initially requested the recordings, some of Mr. Tuhin's interactions with NYMG were still preserved on the hard drive, as he returned his vehicle to the dealership and interacted with NYMG employees that very day. (Ex. D.) From that date until NYMG closed, as counsel made follow-up requests for these recordings, other Plaintiffs were returning to discuss their fraud complaints with Mrs. Smith and other employees. For example, Plaintiff Ysabel Banon returned to NYMG three times during October and November of 2013, speaking with Mrs. Smith and Mr. Eltouby about her purchase, the loan terms, and the promises that had been made to her for refunds and cancellation. (*Banon*, First Am. Compl. ¶¶ 132-33). Similarly, Plaintiff Zheng Hui Dong returned to NYMG several times through early 2014 and showed Mrs. Smith her forged retail installment contract. (*Dong*, Am. Compl. ¶¶ 104-105).

[3] Plaintiffs served the third party subpoena on Bruce Minsky—counsel for Defendants in eight of the nine related cases; however, for the ninth case, *Tuhin*, they inadvertently served it on previous counsel Lloyd Weinstein rather than subsequent counsel Richard Simon. Neither Mr. Weinstein nor Mr. Minsky alerted Plaintiffs to this oversight. As no response was received to this subpoena, however, there was no prejudice to any party.

Accordingly, even if the Plaintiffs' initial signing of the documents were no longer captured at that time (which cannot be determined without a physical inspection of the missing hard drive), many of their other interactions indisputably were, and would have provided key evidence about Mr. Eltouby's and Mrs. Smith's knowledge of and complicity in the fraudulent scheme.

In addition, even if none of the Plaintiffs' interactions were captured on the hard drive as of the earliest date on which it was requested (which, again, is months after the date on which Defendant's duty to preserve arose), other critical evidence was captured. Evidence of broad consumer impact and a pattern of racketeering activity are, respectively, relevant to Plaintiffs' Racketeer Influenced and Corrupt Organizations Act and NY General Business Law § 349 claims. *See* 18 U.S.C.A. § 1962(c); *Wilson v. Nw. Mut. Ins. Co.*, 625 F.3d 54, 64 (2d Cir. 2010) ("Although consumer-oriented conduct does not require a repetition or pattern of deceptive conduct, a plaintiff must 'demonstrate that the acts or practices have a broader impact on consumers at large.'"). Accordingly, recordings of other consumers being defrauded or complaining about being defrauded—which Mr. Eltouby and Mrs. Smith admitted was occurring frequently in the weeks before NYMG closed—would have been valuable evidence supporting Plaintiffs' claims.

In addition, any recordings of Mrs. Smith's interactions with other employees and customers would have corroborated Plaintiffs' claims that she was not an innocent receptionist, but in fact a managerial-level employee who supervised the sales team, observed Mr. Estrada lying to customers about their financing arrangements, and repeated those lies when customers returned to seek relief from their fraudulent loans. The recordings also would have provided crucial impeachment evidence, as a simple video would show whether, contrary to her testimony, Mrs. Smith was in the room when financing documents were negotiated and signed.[4]

CONCLUSION

For these reasons, the Court should, at a minimum, impose a mandatory adverse inference and monetary sanctions.

Dated: New York, NY
March 31, 2017

/s/ Ariana Lindermayer

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[4] As counsel admits in his Declaration, "[t]he images sought…would only reveal who was present and what took place." (Simon Decl. ¶ 3.) This information is precisely what Plaintiffs are entitled to and what Defendants were obligated to preserve. Indeed, counsel acknowledges as much in his next sentence, laying out their defense that "Estrada . . . sought to prevent the absent Eltouby from learning of his thefts." As Mr. Eltouby testified that Mrs. Smith was in charge in his absence and reported back to him, (Ex. C, 484:22-485:10), proof of her presence at these meetings is critical.

Counsel for Defendants further argues that "plaintiff's sole rationale for their claim of purported prejudice [if the hard drive had retained its images] would be to establish if Nada had been in the finance office during plaintiffs' meetings with Estrada. As plaintiffs already have the deposition testimony of Estrada favorable to their claim that Nada had been at plaintiffs' purchase-meetings with Estrada, their contention of prejudice is baseless." (Simon Decl. ¶ 3.) If counsel now seeks to stipulate to the veracity of Mr. Estrada's testimony (including that Mrs. Smith witnessed all of his interactions with customers, and that Mr. Eltouby visited NYMG nearly every day and surveilled his interactions with customers by live feed on his mobile phone, (*see, e.g.*, Ex H, 67:6-69:16, 70:8-71:6, 167:10-169:20), Plaintiffs would so consent. Of note, however, this portion of Mr. Estrada's deposition—which counsel seems to credit—directly contradicts Mrs. Smith's own testimony.

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